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## **Labour Law and Social Security Law in the Czech Republic as Twin Branches of Law**

### *1. The position of labour law within the legal system of the Czech Republic*

If we wish to explore the position of labour law within the legal system of a particular country, in this case of the Czech Republic, or in the territory of the Czech Republic, we need to ask ourselves certain questions in order to arrive at particular conclusions. This involves mainly defining the subject matter of our research, i.e. how labour law is defined, how and when this branch of law came into being, how it developed over time, what its current position is like and how we think it should develop in the future, notably within the EU context.

#### **1. 1. Definition of labour law**

To state simply, labour law deals with “dependent work”. Dependent work is work performed within a relationship in which the employer is superior and the employee is subordinate (s. 2 (1) of Act No. 262/2006 Sb., the Labour Code, as amended). Rather than on behalf of the worker, the work is carried out on behalf of the employer, on the employer’s account, under the employer’s direction and responsibility, and the product of the work becomes property of the employer. The employee is entitled to remuneration (i.e. wages or salary). The employee is usually an economically weaker party than the employer. This economic reality of the employment contract often allows the employer to determine the terms of the employment contract, or employment relationship, and the employee is obliged by the circumstances to agree to the employer’s proposal. This unequal position of the parties should be addressed through employment legislation. In this way, labour law is primarily designed to protect the employee.

Labour law is traditionally divided into two parts, individual and collective labour law. Individual labour law further distinguishes the so-called contractual labour law (sometimes referred to as the law of employment contract) which is covered by private law, and protective labour law covered by public law. Likewise, collective labour law is subdivided into a contractual part, i.e. the law of collective agreements, covered by private law, and protective

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law covered by public law, dealing with the collective protection of employees, their participation in the company management and settlement of collective employment disputes.

Certain authors (e.g. Jan Kostečka<sup>1</sup> in the Czech Republic) note three major development strands in European labour law: firstly, employment contract regulation under private law; secondly, protective legislation under public law; and thirdly, normative collective agreements under private law.

### 1. 2. The origins and development of Czech labour law

From the historical perspective, labour law is a relatively new branch of law. Its origins cannot be precisely identified because it developed only gradually. Broadly speaking (as no details can be provided due to time constraints), in the 19th century the law was divided into public and private law (this dualism is historically rooted in the Roman law which distinguished, according to Ulpian, *ius publicum* and *ius privatum*), and private law was codified in our territory by way of ABGB (General Civil Code from 1811). Title 26 (ss. 1151 – 1174) addressed the issue of “servant contracts”, covering the actual servant contract and a contract for work (as amended by the third partial amendment of 1916). Hence, the cornerstones of labour law were included in civil law regulation. Later on, the exclusively private regulation became affected by public interventions, in particular in the form of the so-called protective legislation (e.g. the Mining Act of 1854, the Trade Act of 1859, Farm Workers Acts, the Working Time Act of 1884, etc.). The early 20th century saw further development of employment legislation, notably after WWI. A number of regulations were adopted, some of them containing comprehensive rules for certain groups of employees, e.g. the Act on Officers Employed at Husbandry and Forestry Enterprises (1914), the Caretakers Act (1920), or laws on individual employment institutes (e.g. in 1918 concerning working time, in 1925 on annual leave, etc.). Likewise, we should include the amendment to s. 1164 of the General Civil Code, provided in Act No. 497/1920 Sb. zák. a nař. [*Collection of Laws and Orders*]. This law incorporated the so-called “coercive provisions” in the Civil Code, preventing the employee’s rights under the provisions of Title 26 from being abolished or restricted by an employment contract. In this way, private law acquired certain public features, which progressively led to a separation of labour law from civil law and a creation of an independent branch of law. Labour law thus justified its *raison d’être* as an independent branch as early as in the 1920s.

Naturally, this tendency is not limited to the Czech labour law. Particularly important for the origins and development of labour law are two European and international events. First, in September 1926 Hugo Sinzheimer, a prominent German scholar, delivered a speech at a conference in Düsseldorf, claiming confidently and optimistically that “labour law has become a special, independent branch of law with its distinct principles and independent forms”, and added emphatically that “labour law is an existing branch of law of today”. The second event, mainly of historical significance, is the establishment of the International Labour Organization in 1919, institutionalising transnational labour protection.

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<sup>1</sup> J. KOSTEČKA: *Pracovní právo v tržní ekonomice* [Labour Law in Market Economy], Lidové noviny, 19 October 1994. p. 8.

### 1. 3. Definition of labour law within private and public law

In Czech academic literature, a number of authors addressed, and recently have revisited, the issue of definition of private and public law. It is noteworthy what Emil Hácha, the later president of the Protectorate of Bohemia and Moravia, had to say as the author of the “Labour law” entry in the Dictionary of Czechoslovak Public Law<sup>2</sup>: “A voluntary employment contract is entered into by the employer and employee as two, from the legal point of view quite equal, contracting parties.” The author further concludes that “it is wrong to assume that a voluntary employment contract is in fact a barter agreement, exchanging goods for other goods (work for wages). In reality, by virtue of an employment contract, employees provide their work energy (force) which is inseparable from their persons, surrendering themselves to the employer’s power.”<sup>3</sup>

Based on this idea several authors<sup>4</sup> believed, contrary to prevailing opinion, that “employment law is a synthesis of private and public law, with both components so inextricably interwoven that they have created a peculiar middle component between public and private law. They referred to the new (third) branch of law as “social law” or “economic law”. By contrast, the contemporary German scholar E. Jacobi resolutely rejected as unwarranted the idea that there was a distinct, separate category of social law.

Certain countries (e.g. Germany and Austria) nowadays use the notion of “social law” too, but in a wider sense.<sup>5</sup> This umbrella notion tends to encompass both labour law and social security law. This relation (as both disciplines have a largely protective function) stems from the interconnection between employment and social laws, notably as regards the provisions regulating sickness and pension insurance (and in the Czech Republic also the separate regulation of statutory health insurance), or security against various other social risks, such as an unemployment security scheme. However, social law is usually not considered as a separate, distinctive branch of law.

“Social law” is clearly a distinct notion from “social rights” which are defined as human and civil rights exercised within the framework provided by labour law and social security law. Social rights are, besides economic, cultural, civil and political rights, included in the constitutional catalogue and they are mostly declared by international pacts and conventions. As a rule, the exercise of citizens’ rights is promoted by a state’s social policy. (*These issues will be discussed later*).

Shortly before his death, Professor Viktor Knapp, a prominent Czech jurist, wrote in his textbook “The Theory of Law”: “There are several theories bearing on the criterion for distinguishing public and private law”, adding that “this distinction has very limited

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<sup>2</sup> For details see *Slovník veřejného práva československého*. [Dictionary of Czechoslovak Public Law], compiled by E. HÁCHA, J. HOETZEL, F. WEYR and K. LAŠTOVKA, Brno 1934. pp. 432–433.

<sup>3</sup> *Op. cit.* p. 426.

<sup>4</sup> E.g. S. DNISTRJANSKIJ: *Základy moderního práva soukromého*. [The Basics of Modern Private Law], Praha 1928, or discussion in journal *Právník* [The Lawyer], volume LXX, 1931.

<sup>5</sup> In its widest sense, social law means “every legal rule which was developed through transformation of socio-political ideas or socio-political concepts”. (M. Fuexs /Hrsg./, *Europäisches Sozialrecht*, Nomos Kommentar, 6. Auflage, Nomos Verlag, Baden-Baden 2013).

practical importance and has always been unclear<sup>6</sup>. He goes on to classify the law into “a number of legal branches, some of them belonging to public law, others to private law, and some being of a hybrid character,” and according to Knapp “the widely recognized classification is nowadays largely traditional and empirical, rather than based on scientific criteria<sup>7</sup>”. Although Knapp elsewhere assigns labour law to private law, I believe that it is typical of labour law that it is a hybrid category. In its totality, it namely cannot be assigned to a single subsystem, i.e. either private or public law, as it immanently implies elements of both systems, and those elements cannot be always precisely separated.

#### 1. 4. Current position of Czech labour law

As early as in the first half of the 20<sup>th</sup> century it was concluded that an employment contract is different from other private contracts, e.g. a purchase contract, a contract of donation, etc. The private character of an employment contract is manifest only during the actual conclusion of the contract, when two equal parties (legal persons) negotiate the employment terms. Obviously, the parties need to agree on essential elements of the contract. Under applicable Czech labour law (currently s. 34 (1) of the Labour Code) the essential elements include: the type of work to be carried out by the employee for the employer; the place or places of work; and the work commencement date. The parties may agree on other relevant terms in the employment contract as well. These terms may notably include the agreed remuneration, working time or a non-compete clause. Once the essential elements have been agreed, and thus a contract has been entered into by both parties, the employment relation established by the contract acquires a much broader scope than provided in the employment contract. The contracting parties immediately assume different roles, no longer on an equal footing in terms of their respective rights and duties. Their roles are based on subordination within the organisation and staff hierarchy of the business or enterprise (the employer). The employer determines the start and end of the working time, stipulates the shift schedule, and decides on the annual leave commencement date for the employee. In addition, from the start of employment both parties are bound by all external and internal regulations in force. These include, in particular, general rules (both statutes and statutory instruments), as well as internal rules (employment guidelines, salary guidelines).

In this connection, collective agreements should be discussed too. This type of agreement played a particularly important role in the development of employment law, influencing both the character and substance of this branch of law. These agreements, resulting from collective bargaining between employees and employers, have become an important source of law (especially after WWII), because by virtue of its laws the state ensures that collective agreements are operational and binding, introducing into contractual terms (a collective agreement is *sui generis* conduct) a feature characteristic of public law. In their operative part collective agreements set out employment terms (working conditions and pay) between the respective employers and their employees. By virtue of these

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<sup>6</sup> V. KNAPP: *Teorie práva*. [The Theory of Law], C. H. Beck, Praha 1995. p. 68.

<sup>7</sup> *Ibid.* p. 69.

agreements the employers undertake not to impose, in individual employment contracts, less favourable conditions (notably as regards the salary) than set out in the collective agreement.

In addition, it is necessary to mention the representation of employees' interests, their right to information and consultation, or the right to collaboration and co-decision with the employer. This covers all issues related to the collective position of employees within businesses or enterprises of the same employer. These bodies (usually referred to as works councils, joint consultative committees, or employee councils in the CR) are in many countries elected by all the staff of a business, enterprise, a group of companies, etc. In the Czech Republic the employees' interests are mostly represented by competent or higher trade union bodies (under the already repealed Act No. 120/1990 Sb., adjusting certain relations between trade unions and employers). A competent trade union organisation represents also the non-member employees. This applies to collective agreements as well.<sup>8</sup>

The traditional distinction between private and public law is in my opinion no longer satisfactory in modern times. Thus, its current relevance should be explored. I believe – also in the light of the establishment and development of the new, specific law of the European Communities (nowadays so-called EU law) – that the distinction between public and private law has become an anachronism relevant solely in the theory of law. EU law is based on different principles (e.g. the principle of primacy over national law, or the subsidiarity principle under which European regulation is reserved to what is not included in national rules, etc.).

The above mentioned facts indicate that no other private contract has been so profoundly affected by public law as the employment contract. This has led, in all modern European states, to an establishment of an independent branch of law known as *labour law*.

## *2. Czech labour law and its relation to European law*

The changing society at the beginning of the 21st century, with increasing globalisation in economy, and other factors (new technologies in industry and agriculture requiring highly qualified work force and its dedication and hard work), have necessitated new rules and legal regulation. Labour law cannot ignore these changes. Moreover, at this complicated moment Czech labour law has to address another issue as well – the obligation to introduce substantial changes arising out of EU legislation. Lately the EU has been namely responding very actively to the above mentioned changes.

Particularly obvious is the influence of the internal market on employment relations in individual EU countries, as well as the impact of company restructuring on employment, the influence of integration on social dumping, the effects of collective bargaining (also on EU level), the issues surrounding the right to information and consultation with the employees in cases of mass redundancies, as well as part-time or fixed-term contracts, flexible working hours, health and safety at work, the right to strike, etc.

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<sup>8</sup> See for example P. TRÖSTER – P. KNEBL: *Zákon o kolektivním vyjednávání. Komentář* [The Collective Bargaining Act. A Commentary], Praha: Wolters Kluwer, 2014.

Through its policies, methods and measures European labour law contributes to the real development of labour law in individual countries, notably in such areas as the free movement of workers, gender equality in employment relations, health and safety at work, as well as protection of pregnant women and young workers, the employer's insolvency, mass redundancies, atypical forms of work (with a place of work other than the employer's workplace, with a possibility not to perform work personally, with non-standard working time arrangements, etc.). The number of regulations and documents included in *acquis communautaire* is increasing and will certainly continue to increase in the future. In the above mentioned areas European labour law is also heavily inspired by the documents of the International Labour Organisation. These regulations are primarily covered by public law.

### *3. The necessity to reform Czech labour law*

Transformation of the Czech economy can not happen without an adequate modification of employment legislation. After 1989, the reform of labour law in the Czech Republic has pursued an avenue of gradual enhancement of the freedom of contract (a dispositive feature) at the expense of coercive (mandatory) regulations. However, the future legal regulation should establish a framework of basic rights and obligations of employees and employers (by laying down minimum requirements and maximum limits), offering considerable latitude to contracting parties in both individual and collective employment relations.

The labour market is a place of permanent conflict between capital and work, and it is a task of labour law in a socially oriented market economy to help to resolve this conflict in the best possible way. While preserving the absolutely necessary protective legislation, it is vital to encourage greater freedom of contract to be enjoyed by contracting parties to an employment relation or other types of work relationship.

However, this process cannot be arbitrary, it must be planned, purposeful, and targeted. In my opinion, this objective, i.e. a balanced relationship ensured by an autonomous position of the parties to the employment contract and by an emancipated position of the parties to the collective agreement, can only be achieved through a well thought-out legal approach, supported by a thorough analysis, which will also take into account practical societal needs.

Labour law is a legal branch whose subject matter are everyday employment relationships between employees and employers, between employee or employer representatives or their associations, and sometimes between employers and the state. All these relations require new legal regulation based on new principles, different from those which were pertinent at the time when the Labour Code was being drafted and passed.

I believe that it will be necessary to preserve labour law as an independent, autonomous branch of law, comprising closely entwined elements from both private and public law. However, that does not mean that the future codification of private law should not regulate general issues (concerning particularly legal facts, representation, security for obligations, computation of time, etc.) in a uniform manner, using the principle of subsidiarity.

#### *4. Social security law in the Czech Republic: the subject matter and the system*

When discussing civil or criminal law in the national or international context, there are usually no terminological difficulties. Both civil and criminal law have had a long historical tradition. In the case of civil law, particularly relevant in whole Europe was Roman law which played a decisive, unifying role.

A totally different situation arises if we use the term “social law”, “social security” or “social security law”, at the national, European or international level. The very word “social”, present in all languages, is very ambiguous. This adjective usually collocates with such words as “security”, “law” or “policy”. For example: in German - *soziale Sicherung* or *soziale Sicherheit*, *Sozialrecht*, *Sozialpolitik*; in English - *Social Security*, *Social Law*, *Social Policy*; in French - *sécurité social*, *droit social*, *politique sociale*. Obviously, other collocations are common too, e.g. social risk, social certainties, social justice, social protection, social agenda, social administration or social insurance, social security benefits, social services, social support, social care, social assistance, etc. It would be quite time-consuming and demanding to define each of these expressions, as they are largely ambiguous. Therefore, only basic terms will be discussed, with the full knowledge that this discussion cannot offer a comprehensive picture. Afterall, these issues are a subject of research in the area of social security law.

##### *4. 1. Definition of “social security”*

The term “social security” is in various countries often interpreted in various ways. Each author has their own definition. In some countries the term “social security” is defined by the law; other countries at least identify the national rules and regulations which specifically belong to the scope of social security. This latter case applies notably to the (few) countries which tend to compile all legal provisions relating to social security in a single act or code (cf. the German *Sozialgesetzbuch* – a code consisting of 11 volumes, ready to include more enactments; however, for example statutory accident insurance is still governed by a special law - *Reichsversicherungsordnung* /Book Three/ from 1911, as amended). Many countries, though, fail to provide a (formal) legal definition of social security, preferring practical solutions on the ground.

Within the territory of the Czech Republic, the term “social security” was, in the previous political system, used to refer to laws from 1956, 1964, 1975 and 1988 which regulated old age pensions, invalidity benefits, bereavement allowances following the death of a breadwinner, social care, or other benefits and services provided to certain persons. However, social security law is not limited to the subject matter of these laws; that would be a misconception.

Historical predecessors of the term “social security” were such terms as “poverty relief” and “social administration”. Both terms developed from the 16<sup>th</sup> to the 19<sup>th</sup> century, when community-level (and later state-level) systems were established to alleviate poverty. These systems were gradually transformed into current systems of social assistance (whether or not administered by the state). Poverty relief back then referred to a system of state-level and community-level measures to assist the poor, following in the footsteps of the church

philanthropic charity. The term “social administration” meant a system of state administration/institutions (including those on the community level) providing poverty relief.

Legislative measures in the area of social security are designed to ensure protection against risks (and underlying uncertainties) related to the emergence and development of the industrialised society, i.e. against social risks. However, there are doubts as to what protection should be ensured and what risks are considered as “social” risks. For example, Bergham understands social security as perfect protection against potential risks. A wider approach to social security is apparent in the ILO Report: *“Into the 21st Century: The Development of Social Security”*. Social security is perceived there as a response to the need for security in the widest possible sense. A similar approach is taken by professor Ben-Israel (general rapporteur on the theme “Social security in the year 2000: Potentialities and problems (including international harmonisation)”) who at the World Congress XIV in 1994 in Seoul replied to her own rhetorical question of what needed to be done in the following way: “Social security must cushion potential crisis situations stemming from economic development, protecting people against possible negative impact of economic crises”, adding that “no economy can exist without preserving human rights, and the assurance arising out of social security must serve to ensure human dignity.”

The term “social risks” usually includes the following cases: lack of income from paid work because the person does not work (or no longer has to work) due to old age, short-term or long-term incapacity or unemployment; the death of a partner engaged in a gainful activity; specific costs connected with child upbringing; the need for health care (to cover the related costs); and insufficient financial means necessary for life in dignity. The systems dealing with certain social risks, which are in some ways related or connected in terms of their legal regulation and implementation by state administration, are often referred to as “branches” of social security, or social security “schemes”.

In recent years a greater emphasis has been placed on the need to provide social protection against social “risks”. However, such needs are nowadays understood differently than in the past. The term “social risk” used to be perceived and applied in a slightly different way. Clearly, the word “risk” cannot be interpreted in its usual sense, suggesting a future uncertain event; for example, a pregnancy and motherhood are generally natural phenomena (while an illness implies pathological changes within an organism). Likewise, reaching retirement age can hardly be called a “risk”. There is a growing tendency to prevent social risks in the first place, then to consider a remedy and rehabilitation or restitution, and only in last place comes a financial compensation for the harm suffered. Some authors tried to define social security as a compilation of benefits in cash and benefits in kind (including services).

The term “social security law” emerged and gradually evolved in a similar way as the term “social security” (in its material sense). In our (continental) approach this branch of law (in its formal sense) is a body of legal rules regulating material welfare and services ensured or provided by the state to its citizens or other individuals if such persons cannot engage in a gainful activity due to a social circumstance recognised by the law, and if their inalienable rights guaranteed by the Constitution are jeopardised.

Social security law and its subject matter have developed gradually; this branch in part evolved from private institutions (brotherhood cash offices and associations, workers’



savings banks and funds), and in part from public institutions (community-controlled poverty relief, support for soldiers and civil servants). Even today it is sometimes believed that this branch of law partly belongs to administrative law and partly to civil law. In my opinion it is a separate legal branch with both private and public elements. Likewise, the authors of the textbook *Substantive Civil Law*<sup>9</sup> argue that according to the prevailing organic theory (subject theory / *Subjektstheorie*) the distinction between public and private law is only approximate. In their opinion, besides hybrid cases there are also questionable cases, “e.g. whether social security law belongs to public law, private law, or both”. Social security law is closely connected with labour law, sometimes even merged into a single unit (social law). This branch of law provides security whenever health-related or social obstacles arise, preventing a person from working. Based on this fact some authors concluded that the future development might lead to an integration of labour law and social security law, giving rise to social law that would provide social protection to citizens as a reflection of their inalienable human rights; these authors even regard the division into labour law and social security law as “social atavism, a legacy of the past when such a division was justified due to various historical trajectories of both legal branches” (Tomeš)<sup>10</sup>.

I do not support such views. As indicated above, social law is a common designation (a common denominator) for both legal branches, as well as a subject taught at certain German and Austrian universities. It is not an independent branch of law; likewise, the Federal Republic of Germany’s Social Code does not use this term, and instead only discusses social rights which include social insurance (i.e. statutory health, pension, accident, nursing and unemployment insurance), social compensation, social support and social assistance.

However, academic literature uses the term “European social law”<sup>11</sup>. Although the EU currently has no common system of social protection yet, and cannot directly guarantee to EU citizens any benefits due to relevant social circumstances, the importance of European social law has been growing and, particularly after the adoption of the Treaty of Amsterdam, significant changes have been introduced which have affected EC primary legislation as well. For example, the Preamble to the Treaty on European Union confirmed an attachment to fundamental social rights as defined in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. In its wider sense, European social law should further include Title IX Employment (Articles 145-150), Title X Social Policy (Articles 151-161), Title XIV Public Health (Article 168), as well as Articles 45 and 48 from Title IV Free Movement of Persons, Services and Capital, of the Treaty of the Functioning of the EU.

A very important document in European social law is the Charter of Fundamental Rights of the European Union<sup>12</sup>, adopted in December 2000 at the summit in Nice (and

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<sup>9</sup> M. KNAPPOVÁ, J. ŠVESTKA et al.: *Občanské právo hmotné*. [Substantive Civil Law], Volume I, Part One: General Part, Praha: ASPI, 2002, p. 42.

<sup>10</sup> See P. TRÖSTER et al., *Právo sociálního zabezpečení* [Social Security Law], 6th ed., Praha: C. H. Beck, 2013 (author of Chapter I.: I. Tomeš), p. 6.

<sup>11</sup> M. FÜCHS: “European social law is a legislative expression of European social policy”. In its narrower sense, European social law is defined by the binding provisions of EC primary and secondary law reflecting primarily the free movement of employees and self-employed persons and non-discrimination.

<sup>12</sup> EU document 2007/C 303/01.

promulgated upon the signature of the Lisbon Treaty on 13 December 2007 in Lisbon), and the European social agenda, published as a document of the European Commission on 28 June 2000. It should be added that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not, except the right to education, regulate economic, social or cultural rights as provided by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Those rights are provided for in the European Social Charter and the Additional Protocol.

From international documents we should mention notably the ILO Convention No. 102 from 1952 on the minimum standards of social security. This convention identified in total nine (according to some sources eight) parts: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors' benefit.

When determining the scope of social security and social security law, an increasing importance is attached to supranational documents and agreements under international law.

I prefer the concept of a social welfare state (in German *sozialrechtlicher Staat*, in French *l'état social*). A social welfare state primarily seeks to achieve social cohesion by limiting social exclusion. To that end, the state develops active labour market policies, compulsory health and social insurance schemes, a social support system of individualised and special-purpose benefits, social assistance and other sub-systems as appropriate, in order to increase employment, ensure reasonable (minimum) income and necessary social services. Solidarity is no charity; it is funded through collected taxes or insurance premiums (contributions). Robust state social administration is developed, in some subsystems combined with non-state social administration, having either of a public law character (health insurance) or a private law character (complementary pension systems).

##### *5. Basic Structure of the Social Security System in the Czech Republic*

At the beginning of the 21st century the Czech social security system is divided into four basic strands (sometimes referred to as subsystems) as follows:

- health insurance;
- social insurance, subdivided into:
  - sickness insurance,
  - pension insurance;
- state social support;
- social care (social assistance).

Until now, this comprehensive system has excluded the areas of accident insurance and unemployment support. What is in other countries known as accident insurance is in the Czech Republic provided for in employment legislation, and is based on the principle of the employer's strict liability for the injury caused to the employee by work accident or occupational disease, with a compulsory commercial insurance of this statutory liability. Another excluded area is support for the unemployed (unemployment benefits, jobseeker's

allowance) which is covered by the state employment policy and is governed by employment legislation.

A peculiarity of the Czech social security system is a separation of health insurance from sickness insurance and social insurance, both in terms of its legal regulation, organisation and implementation, and its funding and administration.

#### 5. 1. Substantial differences of the new policy in comparison with the previous system

In the early 1990s social security in the Czech Republic was, as in all Central and Eastern European countries undergoing transformation, in a precarious situation. The fall of socialism and a removal of centrally planned economy, heralding a shift towards democracy and market economy, have brought numerous new challenges.

The previous political system prided itself on a high level of social protection which it was, however, unable to fully ensure. That policy brought about social passivity reflected in an eager expectation of assistance and guarantees from the state. The social mentality avowed socialist egalitarianism and rejected social inequalities.

Over long decades the social security system was developed as a state social welfare system funded directly from the state budget. The system was disadvantaged by its static character which prevented it from duly responding to the evolution of wages and prices, and from timely obtaining the necessary funding and material resources. A typical feature of such a “carer” system with a dominant role of the state as a “benefactor” was the so-called residual or surplus method for solving social problems, i.e. distributing funds only when there was some leftover funding.

Shortly after the political changes of November 1989, an economic reform was initiated in former Czechoslovakia, together with an extensive, major reform of the legal system. The legal reform included, *inter alia*, a blueprint (scenario) of a social reform. Indeed, it was clear that the economic reform had to be implemented simultaneously with a comprehensive reform of the whole social policy.

The new design of social security policy (progressively introduced after 1989) reflected a shift from state paternalism to participation and responsibility of citizens and social groups for their own social situation and future. It is based on a principle that citizens and families must secure their needs as much as possible (and socially acceptable) themselves. The state should intervene only if citizens or families are, for subjective or objective reasons, unable to do that. However, the state should guarantee to citizens decent social security related to social circumstances.

First (as early as around mid-1990), conditions were created for the social reform by unifying the social security regulation to equalise the position of all persons engaged in a gainful activity, and by establishing new bodies (separated from the rest of the state administration) responsible for social security administration. The social security system was first redesigned in the area of health care.

Sickness insurance provides short-term benefits to citizens affected by certain social circumstances (a sickness benefit, a carer’s allowance / a nursing benefit, a maternity allowance to compensate for the loss of earnings related to a pregnancy/maternity, and a maternity benefit). In the past, certain state benefits were included in the sickness insurance

system which were inherently linked to the state's social functions, rather than to insurance principles. As a result, it was necessary to first exclude such benefits from the sickness insurance system, which happened in 1995 through the State Social Support Act.

The reform of the pension system is an integral part of transformation of the whole social system. The new pension system introduced in 1995 by the Pension Insurance Act is designed as a compulsory scheme guaranteed by the state. This type of insurance guarantees support in old age, invalidity and the death of the breadwinner, in the form of long-term benefits (particular types of income).

Another re-designed system is the system of social support. By way of social support benefits the state helps, in predefined social circumstances, to bear the costs for nutrition and other necessities for children and families, and extends this support to cover some other social circumstances (increased housing costs, commuting expenses when undergoing occupation-specific training, death, etc.). Since January 1996 certain basic social support benefits (e.g. child benefit) have been means-tested, i.e. provided only if the net family revenue failed to reach an amount stipulated by the law. Social support benefits include a parental benefit and a funeral allowance, but these benefits are not means-tested. In order to determine the amount of means-tested benefits, account must be taken of applicable living minimum amounts.

A different approach to the social security system considerably affected social care too. Besides qualitative changes, the new approach also replaced the old term "social care" with "social assistance". Social assistance aims to secure necessities for citizens who have found themselves in a difficult social situation, unable to secure such necessities themselves, or with the assistance of their families. Necessaries include basic personal hygiene, nutrition, clothes and housing, as well as communication and information, general human needs and interests, etc. A difficult social situation can be material need or social need.

This design of social assistance *de lege ferenda* places a greater emphasis on an active role of the recipients and their civil responsibility for themselves and their families. The recipients are not deprived of such responsibility, even if they find themselves in need, unable to overcome the difficulties themselves, and not qualifying for other social security benefits (social insurance, state social support), or such social security benefits are insufficient to resolve the unfavourable situation. Social care (assistance) is provided to citizens in the form of benefits and social care services.

## 6. Trends for future development and modifications

In my opinion, future development trends can be briefly outlined as follows:

- unification of health and sickness insurance;
- raising the retirement age and its future equalisation for men and women;
- strategies to address demographic development and a rise in contribution levels (premiums);
- individualised distribution of benefits in cash;
- coordination of the national system (subsystems) with EU law.

EU Member States currently take two distinct approaches to social security: Germany, France, Italy, Belgium, Greece, Luxembourg, Portugal and Spain based their social insurance systems on Bismarck's social legislation of 1880-1890. By contrast, the national income systems of the UK, Ireland, the Netherlands and Denmark are derived from minimum wages.

However, there is no common social security model; every country is influenced by its national traditions, demographic situation and other cultural and employment conditions, as well as by the economic potential of the society. At the same time, it is necessary to respect the principle of coordination of the social security systems applied within the EU.

A number of issues will have to be resolved in the Czech legislation; the underlying policy approaches will need to be based on robust theoretical analyses, using the latest expertise and knowledge in order to provide effective and long-term solutions. These arguments show the importance of social security law as an independent branch of the law in force, suggesting the necessity to preserve the independence of this discipline.

As regards pension insurance, an increasing imbalance is expected to be observed between revenue and expenditure due to the anticipated demographic development. The reform of the pension system has been (and should continue so in the future) implemented as a continuous and fluid evolutionary process, supported where possible by the society at large, and should include legislative provisions for, and an establishment of, a social insurance company. Progressively, it will be necessary to introduce changes in order to increase citizen participation in voluntary complementary pension systems (for example by making employee private pension schemes with state contribution compulsory by law).

Sickness insurance is mainly governed by the law from 2006 which has already been amended. The legal regulation is now clear and comprehensive, but it comprises elements inconsistent with current socio-economic development. Hence, it is desirable to prepare a new amendment.

Similarly, the applicable law for public healthcare insurance was adopted 18 years ago and was amended many times; therefore, the current legal regulation should be revised and, based on the analysis, a new law should be drafted. This applies to the employment act (from 2004) too. As regards state social support, the current regulation seems quite adequate. By contrast, brand new laws will be probably required for accident insurance and social assistance<sup>13</sup>.

## *7. Conclusion*

People are born free and equal. Social issues concern all of us, from birth to death ("from the cradle to the grave") and social security aims to deal with difficult situations of individuals and families, and to redress harm caused to natural persons by nature or society. Lately, new causes of social uncertainty have been emerging with greater intensity. They largely stem from the global acceleration of scientific and technological progress, leading to a greater mobility of workers, increasing a precarious character of

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<sup>13</sup> Late Act No. 266/2006 Sb., on Accident Insurance for Employees, as amended, was repealed as at 1 October 2015 (see Act No. 205/2015 Sb.).

employment and potentially disrupting family relations. These new phenomena often bring about social exclusion.

To use the words of Pierre Laroque, the founder of the French social security system (Paris 1990): "In its wide sense, social security seeks to strike the right balance between personal freedom and a commitment arising from collective allegiance, as both are needed in order to satisfy the need for security of each individual."<sup>14</sup>

This is a general conceptual framework in which solutions to social security challenges are to be explored. Certainly, such solutions will be place- and time-specific, requiring a constant creative effort.

PETR TRÖSTER

## LABOUR LAW AND SOCIAL SECURITY LAW IN THE CZECH REPUBLIC AS TWIN BRANCHES OF LAW

(Summary)

This paper deals with labour law and social security law in the Czech Republic as twin branches of law.

Labour law deals with not only rights and duties of parties involved in the execution of dependent work, but also with related legal relationships. If work performed by a natural person for another natural or legal person bears signs of dependent work, it must be performed within a labour law relationship. A key principle of labour law is the principle that "everything which is not forbidden is allowed."

Labour law is traditionally divided into two parts, individual and collective labour law.

Social security law is closely related to labour law, sometimes they constitute one unit (social law). Social law provides security related to health and social obstacles that prevent work execution. Social law is a joint term for both legal branches and is also the subject of education at certain German and Austrian universities.

The opinion of the author of this paper is that it is a separate legal branch with both private and public elements.

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<sup>14</sup> Quotation from the author's introductory speech at a workshop called *"International Comparison of Social Security Policies and Systems"*, printed by research institute MIRE (Mission Recherche), Czech version provided by VLADIMÍR RYS. In: *Česká sociální reforma, sociologická studie* [The Czech Social Reform, a Sociological Study]. Praha: Karolinum, 2003, pp. 5 and 138.